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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 54

UNITED STATES OF AMERICA, PETITIONER

v.

DOROTHY ANNE STAPF and B. T. WARE, II, Executors and Trustees of the Estate of LOWELL H. STAPF, Deceased, and DOROTHY ANNE STAPF, Individually

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the district court (R. 28-47) is reported at 189 F. Supp. 830. The opinion of the court of appeals (R. 64-96) is reported at 309 F. 2d 592.

JURISDICTION

The judgment of the court of appeals was entered on September 26, 1962 (R. 97-98). By order of Mr. Justice Stewart, dated December 21, 1962, the time for filing a petition for certiorari was extended to and including January 9, 1963 (R. 99). The petition for

certiorari was filed on January 9, 1963, and was granted on February 25, 1963 (R. 100; 372 U.S. 928). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a devise of property to a surviving spouse on condition that she convey property of equal value to a third party entitles the decedent's estate to a marital deduction under § 812(e) of the Internal Revenue Code of 1939.

2. Whether obligations of a solvent community estate, half of which would otherwise be charged to the wife's half of the community property but which the decedent's will directs to be paid entirely from the half includible in his gross estate, are deductible in full from the decedent's gross estate as "claims against the estate" within the meaning of § 812(b)(3) of the Code.

3. Whether costs of administration chargeable to the wife's half of the community property but which the decedent's will directs to be paid out of his half are deductible from the decedent's gross estate as "administration expenses" under § 812(b)(2) of the Code.

STATUTES AND REGULATIONS INVOLVED

Sections 812(b), 812(e), and 1000 of the Internal Revenue Code of 1939; §§ 81.29, 81.32, 81.36, and 81.47c of Treasury Regulations 105 (1939 Code); and 86.2 of Treasury Regulations 108 (1939 Code) are set forth in part in the Appendix, *infra*, pp. 25-30.

STATEMENT

1. Lowell H. Stapf died on July 29, 1953, a resident of Texas. He was survived by his wife, Dorothy Anne Stapf. His will provided (R. 7):

> My estate consists of both separate and community property. It is my purpose, in making testamentary disposition of my estate, to dispose of my separate estate and to dispose of the entire community estate as though it were my separate property, and my wife is requested to take under this will and waive her right to one-half of the community property. In the event she does not elect to take under this will, then my interest in the community estate and my separate property shall be held [in trust for my children], * * * and my wife shall not receive any part of my interest in the community property or any interest in my separate property.

If she elected to take under the will, Mrs. Stapf was to receive the family automobile and one-third of the combined estate remaining after payment of a specific bequest of $5,000 to a son (R. 8, 14). The residue (after payment of debts, administration expenses, and taxes) was given in trust for the children (R. 8).

The debt-payment provision of the will directed the executors (R. 13-14):

> * * * to pay all and not merely one-half of the following debts and charges out of my one-half part and share of our community property and estate, to wit: [all debts, whether community or separate, all administration expenses, and all taxes] * * *. I direct that all property devised [to my wife] * * * shall pass under the terms of this Will free of all funeral expenses, costs of administration, debts of my estate, federal estate taxes and state inheritance taxes; provided, however, that in the event my wife, Dorothy Ann Stapf, does not elect to take under this Will, then one-half of all debts of my estate, funeral expenses and costs of administration shall be charged to the one-half share and

> part and portion of the community estate of my marriage with Dorothy Ann Stapf vested in the said Dorothy Ann Stapf in accordance with the laws of the State of Texas.

2. The decedent's separate property was valued at $65,000[1] and the community property at $258,104.54 (R. 53). The total amount of the debts, all of which were community debts, was $32,367.74. Administration expenses totalled $4,073.47 (R. 51).

Had Mrs. Stapf not elected to take under the will, her half of the community property ($129,052.27) would have been charged with one-half the community debts ($16,183.87) and 35% of the administration expenses ($1,425.72) (R. 54-55, 59, 66, n. 2). She would therefore have received $111,442.68.

Mrs. Stapf in fact elected to take under the will. Under the will, she received the automobile (valued at $1,400) and one-third of the combined estate remaining after the specific bequests ($105,568.18[2]), a total of $106,968.18.[3] Of that amount, the court of appeals treated $22,366.66 (one-third of the decedent's separate property; $21,666.66, plus his one-

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[1] Omitting $100 worth of tools that were the subject of a specific bequest and thus had no effect on the determination of Mrs. Stapf's share.

[2] The combined estate ($65,000 of separate property plus $258,104.54 of community property) totalled $323,104.54. The specific bequests of $6,400 ($5,000 to the son and the $1,400 automobile to the wife) reduced the estate to be divided to $316,704.54. One-third of that amount is $105,568.18 (see R. 54).

[3] The district court and the court of appeals included in the total amount received by Mrs. Stapf only $700 for the car, representing the decedent's one-half interest, and thus arrived at a total of only $106,268.18 (R. 54, 65). In fact, of course, Mrs. Stapf also retained her own one-half of the car, so that the correct figure is $106,968.18 as given in the text.

half of the community automobile, $700), as having passed from the decedent to Mrs. Stapf under the will and the balance of $84,601.52 (one-third of the community property remaining after the specific bequests) as coming out of her own half of the community property (R. 65, 71).[4] On that characterization of the amounts received by Mrs. Stapf, the consequence to her of electing to take under the will was that she gave up $26,841.16 of her own property,[5] allowing it to pass to the trust for the children under the terms of the will, and received $22,366.66 of her husband's property. By taking under the will, she thus suffered a net loss of $4,474.50.[6]

3. In its estate tax return, the decedent's estate claimed a marital deduction under § 812(e) of the Internal Revenue Code of 1939[7] for the full value of the decedent's property that passed to the wife under

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[4] In support of its characterization of Mrs. Stapf's receipts, the court of appeals cited two Texas state court decisions dealing with the applicability of state inheritance taxes to such a bequest (R. 71). For present purposes, we do not challenge either the court's conclusion that Mrs. Stapf's receipts would be so characterized for state law purposes or its assumption that that characterization would be controlling for federal estate tax purposes.

[5] *I.e.*, keeping only $84,601.52 of community property out of her interest worth $111,442.68.

[6] The net loss is of course the same if the comparison is made between the total amount Mrs. Stapf received upon electing to take under the will ($106,968.18) and the amount she would have received had she not ($111,442.68). The discrepancy between the net loss as we have computed it ($4,474.50) and the net loss as the lower courts computed it ($5,174.50, R. 54-55, 65) is due to their understatement by $700 of the value of the automobile she received (see note 3, *supra*).

[7] Unless otherwise indicated, all section references will be to the Internal Revenue Code of 1939 (26 U.S.C., 1952 ed.). The successor provisions of the 1954 Code are substantially identical.

the will ($22,366.66). It also claimed a deduction for the entire $32,367.74 of community debts as "claims against the estate" under § 812(b)(3), and for the entire $4,073.47 of expenses as "administration expenses" under § 812(b)(2).

The Commissioner of Internal Revenue disallowed the marital deduction[8] and the portions of the deductions for claims and administration expenses representing the debts (50%) and expenses (35%) attributable to the wife's half of the community property. The district court, in a suit for refund duly brought, upheld the partial disallowance of the claims and expense deductions but allowed the full marital deduction claimed by the estate (R. 59). The court of appeals, with Judge Wisdom dissenting on all issues (R. 74-96), held that all of the claimed deductions were allowable in full (R. 64-74).

SUMMARY OF ARGUMENT

I.

The first question is whether the decedent's bequest to his widow of property worth $22,367 on condition that she convey property worth $26,841 to the children entitles the estate to a $22,367 marital deduction under § 812(e) of the 1939 Code. That section allows a deduction for "the value of any interest in prop-

[8] Under the mistaken assumption that the specific bequest of the automobile to Mrs. Stapf was not conditioned upon her election to take under the will, the Commissioner actually allowed $700 of the claimed marital deduction, representing the decedent's half interest in the car. That allowance was not challenged in the district court and for that reason we do not here press for a reversal of the judgment below insofar as it allows that deduction (see R. 71, n. 5). To avoid confusion, however, we will in the argument use the correct figures.

erty which passes * * * from the decedent to his surviving spouse" but then directs that, in valuing the interest, if "the surviving spouse incurs any obligation imposed by the decedent with respect to the passing of such interest, such * * * obligation shall be taken into account in the same manner as if the amount of a gift to such spouse of such interest were being determined" (§ 812(e)(1)(E)(ii)). For gift tax purposes, in turn, it is obvious—and the regulations, copying from the committee reports, expressly so provide—that a transfer from *A* to *B* on condition that *B* convey property of equal value to *C* is a gift to *C*, not to *B*. (It is *C* who, for example, would be secondarily liable for the gift tax and whose status would determine the availability of a charitable deduction or of the annual exclusion.) There would be a gift to *B* only if (and only to the extent that) the value of the property he received exceeded the value of the property he was required to convey. It follows then, from the express terms of § 812(e)(1)(E)(ii), that for estate tax marital-deduction purposes the value of a conditional bequest to a spouse is the value of the property given to her less the value of the property she is required to give another to receive it. Since Mrs. Stapf was required to give up more than she got, that value is zero and the estate is entitled to no marital deduction.

That result is required also by the purpose of the marital deduction, which was solely to permit the "splitting" of estates between husband and wife and not to permit the transmission of wealth from one generation to the next free of either the gift or the estate tax, which is the admitted consequence of the decision below.

II.

The second question is whether the provision in the decedent's will directing his executors to pay all the community debts out of his half of the community property entitles the estate to deduct the entire amount of the debts under § 812(b)(3) as "claims against the estate * * * allowed by the laws of" the administering State. In the absence of the will, under Texas law the community debts would be charged equally against both halves of the community and, consequently, the estate would be entitled to a "claims" deduction for only one-half the community debts. The will cannot change the result. The very essence of a claim is that it is enforceable against the estate irrespective of the testator's wishes and thereby reduces the net value of the property over which he has testamentary power. Something that is payable by the estate only because the testator gratuitously directed its payment in his will is a legacy, not a claim. The law requiring its payment is not the law of the State governing the allowance of claims, but the law of the State governing the enforceability of wills. And even were it a claim it would be one founded upon a "promise or agreement" (the testator's consensual undertaking by his will) unsupported by adequate consideration and nondeductible for that reason.

III.

The administration expenses allocable to the wife's half of the community property, which the will similarly directed to be paid out of the decedent's half, were nondeductible for the same reason as the wife's share of the debts.

ARGUMENT

I.

A Testamentary Gift of Property to a Wife on Condition That She Convey Property of Her Own, of Equal or Greater Value, to a Third Party Is a Gift to the Third Party, Not to the Wife, and Does Not Qualify for the Marital Deduction

Mr. Stapf's will gave property worth $22,367 to his wife on condition that she convey property of her own worth $26,841 to a trust for the children created by the will. Mrs. Stapf elected to comply with the condition and thus suffered a net loss of $4,474. The question is whether the estate is entitled to a marital deduction under § 812(e) of the 1939 Code for the $22,367 so transferred to Mrs. Stapf, notwithstanding that it cost her $26,841 to receive it.

1. The marital deduction is allowed for "the value of any interest in property which passes * * * from the decedent to his surviving spouse" (§ 812(e)(1)(A)). In valuing the gift, the statute directs that, if "the surviving spouse incurs any obligation imposed by the decedent with respect to the passing of such interest, such * * * obligation shall be taken into account in the same manner as if the amount of a gift to such spouse of such interest were being determined" (§ 812(e)(1)(E)(ii)). An undertaking by the wife to convey property to a third person, upon which her receipt of property under the decedent's will is conditioned, is plainly an "obligation imposed by the decedent with respect to the passing of such interest." The question then is how such an obligation would be taken into account if the amount of an *inter vivos* gift to the spouse were being determined.

If *A* conveyed $4,000 to *B* on condition that *B* convey an automobile worth $4,000 to *C*, there is no doubt

that *A* would have made a gift, subject to the gift tax, in the amount of $4,000. The question the statute asks, however, is not the amount of the gift *by* the husband but the amount of the gift *to* the wife. Thus the relevant question, ignored by the court of appeals, is: who would be the *donee* of the gift, *B* or *C*? Who, for example, would be secondarily liable for the gift tax (§ 1009)? And whose status would determine the availability of the charitable deduction (§ 1004(a)(2)), of the annual exclusion (§ 1003(b)(3)), of the martial deduction (§ 1004(a)(3)), and of the privilege of having the gift deemed made one-half by *A's* spouse (§ 1000(f)(1))? Were *B* an automobile dealer and *C* a child of *A*, the answer could hardly be doubted. Not even the respondents would suggest that the automobile dealer, having simply sold a car and delivered it to the buyer's nominee, could be liable as donee for the gift tax, or that the father, having already made gifts exceeding $3,000 to his son, could claim a further annual exclusion by showing that he had made no prior gifts to the automobile dealer. The answer would be no less clear if *B* were a charity and *C* not, or *C* a charity and *B* not: the charitable deduction would be available in the latter case, not the former. Similarly, if *C* were *A's* wife, the gift would qualify for the martial deduction, while if *B* were, the gift would be to other than a spouse and the gift-splitting privilege would be available.

That the gift in every such case is to *C* and not *B* is self-evident, but authority, if wanted, is not lacking. The gift tax is expressly made applicable "whether the gift is direct or indirect" (§ 1000(b)), and the committee reports give as examples of "indirect" gifts transactions substantially identical to that involved

here (H. Rep. 708, 72d Cong., 1st Sess., pp. 27-28; S. Rep. 665, 72d Cong., 1st Sess., pp. 39-40):

> * * * (3) a transfer of property to B where there is imposed upon B the obligation of paying a commensurate annuity to C would be a gift to C; (4) the payment of money or the transfer of property to B in consideration whereof he is to render a service to C would constitute a gift to C or gifts both to B and to C depending on whether the service to be rendered by B to C was or was not an adequate and full consideration in money or money's worth for that which was received by B; * * *.

The gift tax regulations repeat those examples substantially verbatim. Regs. 108 (1939 Code), § 86.2(a) (Ex. 2 and 3).[9] Both the committee reports and the regulations thus leave no doubt that, in the gift accomplished by a transfer from *A* to *B* on condition that *B* transfer property of equal value to *C*, it is *C*, not *B*, who is the donee.

That conclusion is supported also by this Court's decision in *Helvering* v. *Hutchings*, 312 U.S. 393, holding that, for purposes of determining the number of "donees" and hence the number of annual exclusions, a gift to a trust is, not a single gift to the trustee, but several gifts to the several beneficiaries. The Court's rationale seems equally applicable to gifts through intermediaries other than trusts (see especially 312 U.S. at 396, drawing upon the above-quoted examples

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[9] The regulations add still another relevant example of a gift from *A* to *C*: *A*'s purchase of property with title being taken in *C*'s name (jointly with *A*, in the actual example) (Ex. 5). A transfer from *A* to *B* on condition that *B* convey property to *C* is in substance but *A*'s "purchase" of the property from *B* with directions that it be conveyed to *C*.

in the committee reports).[10] See also *Estate of Bartman* v. *Commissioner*, 10 T.C. 1073, 1080. That *C* is the donee of *A's* gift is also the necessary implication of the decisions of the lower courts that *B* is *not* liable for a gift tax on his transfer to *C* made as a condition to receiving a transfer from *A* (except, of course, to the extent that *B* gives more than he gets). *Commissioner* v. *Siegel*, 250 F. 2d 339 (C.A. 9); *Chase National Bank* v. *Commissioner*, 25 T.C. 617, reversed on other grounds, 259 F. 2d 231 (C.A. 5); cf. *Vardell's Estate* v. *Commissioner*, 307 F. 2d 688, 693 (C.A. 5); *Whiteley* v. *United States* (W.D. Wash.), decided February 28, 1963 (63-1 U.S.T.C. ¶ 12,145). *C*, the only one enriched by the transaction, is obviously in receipt of a gift from someone, and if *B* is not his donor, *A* must be.

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[10] *Commissioner* v. *Wemyss*, 324 U.S. 303, on which the court of appeals relied (R. 73), is not to the contrary. There a widow had an income interest in a trust that would terminate upon her remarriage (the interest succeeding to her child by the former marriage). To induce her to marry him, the taxpayer gave the widow securities in an amount sufficient to replace the income she would lose. The Court held that, since marriage (the only benefit flowing to the taxpayer) was not a consideration in "money's worth," the transfer of the securities was a taxable gift. But the Court did not decide (as it had no need to decide) that the taxpayer had made a gift *to the widow*, for it was plain enough that he had made a gift to someone, either to her or to the child. In the circumstances of that case, moreover, we think it would be quite correct to view the gift as having been to the widow; the reason is that, unlike here, the bargained-for consideration (albeit not qualifying as "money's worth" consideration for gift tax purposes) was the *marriage*, not the relinquishment of the trust interest (which followed merely as an unsought but unavoidable consequence of the marriage). Be that as it may, the Court's actual decision, limited to the existence of a taxable gift *vel non*, has no bearing on the issue here.

The committee reports, the regulations, and the cases thus all confirm the obvious: that a transfer from *A* to *B* on condition that *B* make a transfer to *C* is, to the extent of the equivalence in value of the transfers, a gift from *A* to *C*. There is a gift from *A* to *B* only to the extent that the transfer to *B* exceeds in value his transfer to *C*.

If that is the rule for gift tax purposes, then by the express terms of § 812(e)(1)(E)(ii) it is also the rule for estate tax marital-deduction purposes: the value of the interest passing to the wife is the value of the property given her less the value of the property she is required to give another as a condition to receiving it. And so the estate tax regulations provide, giving as an example the very kind of testamentary disposition involved in this case (a bequest conditional upon the wife's election to relinquish her interest in community property). Regs. 105, § 81.47c(b) (Ex. 1 and 3).[11] To conclude the matter, it should be sufficient to note that here, too, the regulations find specific support in the committee reports (S. Rep. 1013, 80th Cong., 2d Sess., Pt. 2, p. 6):

> If the decedent bequeaths certain property to his surviving spouse subject, however, to her agreement, or a charge on the property, for payment of $1,000 to X, the value of the bequest (and, accordingly, the value of the interest passing to the surviving spouse) is the value, reduced by $1,000, of such property.

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[11] The other example cited, equally in point, is that of a decedent's devise of a residence worth $25,000 to his widow "with a direction that she pay $5,000 to his sister." The value of the interest passing to the widow for marital deduction purposes is, according to the regulation, only the net value of $20,000.

2. What is apparent from the face of the statute is confirmed by brief reflection upon the purposes of the marital deduction and the "startling" possibilities produced by the decision below (see 76 Harv. L. Rev. 1671, 1673).

The purpose of the martial deduction was to extend to taxpayers in common-law jurisdictions the advantages of estate "splitting" previously enjoyed only by taxpayers in community-property jurisdictions—namely, the lower total tax resulting from the application of progressive estate-tax rates separately to two halves rather than to one whole.[12] The purpose being only to permit the property of a husband and wife to be taxed in two piles, and not to allow it to escape taxation altogether in the spouses' generation, it was of the essence that the deduction should be limited, as it was, to gifts to a spouse and then only if the interest given was of such a nature that it would be taxable in the spouse's estate (*i.e.*, not a "terminable" interest, § 812(e)(1)(B)).[13]

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[12] See H. Rep. No. 1274, 80th Cong., 2d Sess., pp. 24-26; S. Rep. No. 1013, 80th Cong., 2d Sess., pp. 26-29. The marital-deduction provision was added by the Revenue Act of 1948, 62 Stat. 110. For an earlier attempt to eliminate the discrimination by a different means (taxing the husband on all of the community), see § 402(b), Revenue Act of 1942, 56 Stat. 942; H. Rep. No. 2333, 77th Cong., 2d Sess., pp. 35-37.

[13] See S. Rep. No. 1013, *supra*, p. 28; Warren & Surrey, *Federal Estate and Gift Taxation* (1961), pp. 759-760. Congressional preoccupation with the eventual taxibility of marital-deduction property in the surviving spouse's estate is exemplified by the exception (§ 812(e)(1)(F)) from the terminable-interest rule of a gift to a wife in trust for life with general power to appoint the remainder. Though the wife's interest in such property is qualitatively slightly inferior to a widow's title to half the community property, deduction was allowed on the ground that the property would, because of the general power of appointment, be taxable in her estate. See S. Rep. No. 1013, *supra*, p. 28; *id.*, Part 2, p. 16.

In allowing a martial deduction for the full value of property left a wife notwithstanding she is required, as a condition to receiving it, to convey property of equal value to the decedent's nominee, the decision below wholly corrupts the purpose of the martial deduction. Born a means to permit estate-splitting between spouses, it becomes a device by which any married person may remove one-half his estate from the reach of either the gift or the estate tax in either his or his wife's estate. Any decedent anywhere leaving a spouse surviving may dispose of his entire estate however and to whomever he pleases (*e.g.*, in trust for as many generations of descendants as the rule against perpetuities will permit), give nothing to his spouse (other than in exchange for property of equal value), and still make full use of the marital deduction so that only one-half his estate will be taxed.[14] All he need do to achieve that remarkable result is to preface the dispositive provisions of his will with a provision giving the property to his spouse "on condition" that

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[14] The only exception is a decedent having community property. The marital deduction is limited to one-half the "adjusted gross estate" (§ 812(e)(1)(H)) and that term excludes community property (§ 812(e)(2)), so that a marital deduction is available only if, and to the extent that, a decedent has separate property. The wife's half of the community property is, of course, excluded from the decedent's estate, but the property so excluded remains in the wife's estate and is subject to gift or estate taxes on its transmission to the next generation. Under the decision below, therefore, spouses in a common-law State can transmit up to one-half of their combined estate to the children free of tax while spouses in a community-property State cannot. That a provision designed to remove the discrimination in favor of community-property spouses should result in a discrimination against them is one of the minor anomalies produced by the decision below.

she convey property of equal value[15] in the manner directed by the remaining provisions.

The court of appeals acknowledged the surprising consequence of its decision that it permitted wealth to pass from one generation to the next without being subject to either of the transfer taxes (R. 73-74), but drew comfort from what promises to become the most distracting metaphor of modern tax litigation: "Granting * * * that these taxpayers have found a hole in the dike, we believe it one that calls for the application of the congressional thumb, not the court's" (R. 74, n. 8). That Congress has a thumb does not justify a court in lightly assuming that it is all thumbs. The assumption must rather be that what Congress has done makes sense, and in this instance one who looks for sense in the statute has no difficulty finding it. Fairly read, § 812(e)(1)(F)(ii) requires that, in determining the value of the testamentary gift to Mrs. Stapf for marital-deduction purposes, the value of the property transferred to her ($22,367) must be reduced by the value of the property she was required to relinquish as a condition to receiving it ($26,841). Since that leaves a negative value,[16] the estate is entitled to no marital deduction.

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[15] Nor need the widow have property of her own to comply with the condition. Were an unpropertied widow left $100,000 on condition that she convey $100,000 worth of General Motors stock to her son, she could comply with the condition by using the $100,000 given her (or borrowing against it) to buy the required stock.

[16] The consequence, as the court of appeals recognized (R. 73), is that Mrs. Stapf was herself liable for a gift tax on the excess of the value of the property she relinquished in favor of the children over the value of the property received by her.

II.

A Provision in a Will Directing the Payment Out of the Decedent's Half of Community Property of Debts for Which the Wife's Half Is Equally Liable Is, as to the One-Half of the Debts Otherwise Chargeable to the Wife's Share, a Mere Legacy, and the Estate May Deduct as "Claims Against the Estate" Only the One-Half Chargeable to the Decedent's Share of the Community

Section 812(b)(3) of the Code provides that there shall be deducted from the value of the gross estate "Such amounts * * * for claims against the estate * * * as are allowed by the laws of" the administering State. The Stapfs' community property ($258,104) was subject to community debts of $32,367. Only one-half of the community property was includible in the decedent's estate and, in the absence of a will providing otherwise, only one-half of the community debts would be charged to his half. His will, however, directed his executors "to pay all and not merely one-half of the [community debts] * * * out of my one-half part and share of our community property" (R. 13).[17] The question is whether the estate was entitled, because of that provision, to deduct the entire amount of the com-

[17] Actually, the provision was conditioned upon Mrs. Stapf's election to take under the will (R. 14) and for that reason seems to have been wholly inoperative. The condition meant that the executors were to pay "her" debts only if she allowed a part of her share of the community *greater* than the debts to pass under the will. Nor did the provision in any way affect the distribution under the will: since her one-third share of the combined estate was to be determined before payment of the debts, which of the remaining assets were used for that purpose was a matter of indifference to her; and since the children got the residue of "her" share of the community as well as of "his", which share was charged with the debts could likewise have no effect upon what they got. The net effect of the provision was thus simply to change the labels on the dollars passing to the children: the executors were to use dollars labeled "his" to pay the debts, leaving fewer for the

munity debts as "claims against the estate." On that question (as, indeed, on the first) there is little that can be added to Judge Wisdom's scholarly dissent (see R. 74-85), and we need only briefly state the controlling considerations.

1. On the treatment of community debts in the absence of a contrary direction in a will, there is no disagreement between the majority and dissenting opinions in the court of appeals, between the court of appeals and the district court (reversed on this issue), or, we believe, between the parties.

Community debts are primarily the obligation of the community, chargeable equally against both halves upon its dissolution. The husband, as manager of the community, is also personally liable for the debts while the wife is not, but his liability is, as between him and the community, only that of a surety. If he pays community debts with his separate property, voluntarily or involuntarily, he is entitled to reimbursement from the community, the primary obligor. *Snodgrass* v. *Robertson*, 167 S.W. 2d 534 (Tex. Civ. App.). If, then, Stapf's will had made no provision for debt pay-

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children, provided she conveyed enough "her" dollars to the children to make up for the reduction.

The inconsequence of the provision was, however, overlooked by the court of appeals, and in order to deal with the question in the terms in which it was decided by the court of appeals, we will assume that the provision was not contingent upon Mrs. Stapf's taking under the will. Had she not taken under the will and the executors had nevertheless paid the entire community debts, the effect would have been to give her $129,052 of the community property rather than the $111,442 she would have taken in the absence of the provision ($129,052 less her share of the community debts and administration expenses, $17,609). It is in terms of a debt-payment provision with those substantive consequences (rather than the mere labelling provision actually involved in this case) that the discussion in text is cast.

ment, the probate court, in determining the distribution of the community property as between the decedent's devisees and Mrs. Stapf, could have charged only one-half of the community debts against the decedent's half of the community property. Only if the community were insolvent (not the case here) could the decedent's estate (and thus his devisees) be made to bear the burden of more than one-half the debts. *Clark* v. *First National Bank*, 210 S.W. 677, 679 (Tex. Com. App.); see also R. 69 (majority opinion), 76-79 (dissenting opinion).

No less clear than the law of Texas are the tax consequences flowing from it. Since Texas law would "allow" only one-half the community debts against the decedent's estate, only one-half the debts would be deductible as "claims against the estate * * * allowed by" State law (§ 812(b)(3)). And so the courts and commentators have uniformly held.[18] Even if, because of the husband's personal liability as manager of the community, his estate were directly suable as a procedural matter, the estate's rights of recourse against the solvent community would bar any claims deduction for more than one-half the debts.[19]

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[18] *Lang's Estate* v. *Commissioner*, 97 F. 2d 867 (C.A. 9), affirmed on other issues, 304 U.S. 264; *Claiborne* v. *Commissioner*, 40 B.T.A. 722; see *Schoenfeld* v. *Commissioner*, 103 F. 2d 964 (C.A. 9); 4 Mertens, *Federal Gift and Estate Taxation* (1959), Sec. 26.20; Warren & Surrey, *Federal Estate and Gift Taxation* (1961), p. 710; Lowndes and Kramer, *Federal Estate and Gift Taxes* (1962), Sec. 15.18; cf. *Stewart* v. *Commissioner*, 63 F. 2d 62 (C.A. 5), certiorari denied, 284 U.S. 658.

[19] Cf. *Parrott* v. *Commissioner*, 30 F. 2d 792 (C.A. 9), certiorari denied, 279 U.S. 870 (joint and several liability on mortgage note); *DuVal's Estate* v. *Commissioner*, 152 F. 2d 103 (C.A. 9), certiorari denied, 328 U.S. 838 (co-guarantor); *Towner* v. *Commissioner*, 182 F. 2d 903 (C.A. 2), certiorari denied, 340 U.S. 912 (accommoda-

2. The only dispute then is over the effect of the will. Does the will's direction to the executors to pay the wife's half of the community debts as well entitle the estate to deduct the entire community debts as "claims against the estate * * * allowed by" State law? Patently not. The very essence of a "claim" is that it is enforceable against the estate irrespective of the debtor's wishes and thus reduces the net value of the property over which the decedent has testamentary power. An amount payable by the estate only because the decedent directed his executors so to distribute his wealth is no "claim" at all, certainly not one "against the [decedent's] estate." Such a provision, as Judge Wisdom aptly described it (R. 76), is but a "straight pecuniary legacy" to the person whose debts are to be paid.

Nor is it relevant that the law of the State would enforce the provision. In permitting deductions for "claims against the estate * * * allowed by" State law, the Code's reference is to the State's law governing the allowance of claims—*i.e.*, the compelled payment of claims enforceable against the estate without regard to the testator's will—and not the law governing the validity and enforceability of wills. It was only under the latter law that the payment of Mrs. Stapf's half

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tion maker); *Estate of Cabot* v. *Commissioner*, 46 B.T.A. 225 (guarantor); *Estate of Atkins* v. *Commissioner*, 2 T.C. 332 (co-maker); *Sample* v. *United States* (W.D. Pa.), decided March 9, 1961 (61-1 U.S.T.C., ¶ 12,004) (joint federal income tax liability). As the *Parrott* and *Atkins* cases recognize, the effect is the same if the "claims" deduction is allowed in full to the secondary obligor's estate and the value of the right of recourse against the primary obligor is included in the gross estate as "property" of the decedent's (§ 811(a)). Either way, the taxable estate is not reduced unless the primary obligor is insolvent.

of the community debts out of the decedent's property was enforceable.

Finally, allowance of the deduction here would be inconsistent with the provisions of § 812(b) allowing a deduction for claims founded on a "promise or agreement" only if contracted "for an adequate and full consideration in money or money's worth." The transaction that is relevant is not the transaction by which the community became liable (as the court of appeals suggested, R. 70), but the transaction by which the decedent's estate became liable to pay the entire debts of the community without recourse to the wife's half of the community. The duty of the estate to pay all the debts was imposed, in turn, not by law, but by the decedent's undertaking in his will, which in no relevant respect is different from an *inter vivos* "promise" equally unsupported by adequate consideration.[20] The purpose of the adequate-consideration limitation on the claims deduction was to prevent testamentary dispositions from being made as deductible "claims" through the device of gratuitous, if binding, promises. See S. Rep. 398, 68th Cong., 1st Sess., p. 35; H. Rep. 179, 68th Cong., 1st Sess., p. 28. It would indeed be anomalous if, adequate consideration being lacking in both cases, a binding *inter vivos* commitment did not give rise to a deductible claim but an ambulatory direction in a will did.

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[20] We are assuming here, as did the court of appeals, an unconditional direction to pay the debts (see p. 17, n. 17, *supra*). Where the executors are told to pay the wife's share of the debts only if she conveys property of equal value to the children (the actual case), there is "consideration" for the payment but the payment is even more obviously not a satisfaction of a pre-existing "claim"; it amounts simply to a "purchase" of other assets with which to effect a testamentary gift to the children. See Point I, *supra*.

III.

The Administration Expenses Chargeable Under State Law to His Wife's Half of the Community Property Were Not Deductible from the Decedent's Gross Estate Notwithstanding the Will Directing Their Payment

The expenses of administering the combined estate (consisting of both the community property and the decedent's separate property) were $4,073. Under Texas law an allocable share of those costs (determined to be $1,425) was chargeable to Mrs. Stapf's half of the community property. *Norwood* v. *Farmers & Merchants Nat. Bank*, 145 S.W. 2d 1100 (Tex. Civ. App.); see *Goggans* v. *Simmons*, 319 S.W. 2d 442 (Tex. Civ. App.). Stapf's will, however, directed that all the administration expenses be paid out of his half of the community property. The question is whether their payment under that provision made the wife's share of the costs deductible by the estate as "administration expenses * * * allowed by the laws of" the State under § 812(b)(2) of the Code.

That question is substantially identical to that of the deductibility of the community debts discussed in Point II. As their enumeration together in § 812(b) suggests, "claims" and "administration expenses" have a common character as deductions: both are liabilities of the estate that reduce the net value of the property subject to testamentary disposition. They differ only in the formal respect, irrelevant here, that "claims" are liabilities existing at the date of death while "administration expenses" are liabilities incurred in administering the estate. If, therefore, the share of the community debts chargeable to Mrs. Stapf's half of the community property were not "claims against the estate" within the meaning of

§ 812(b)(3), it follows for the same reasons that the administration costs chargeable to her half of the property were not "administration expenses" of the estate within the meaning of § 812(b)(2). They are accordingly not deductible. See *Lang's Estate* v. *Commissioner, supra; Estate of Lee* v. *Commissioner*, 11 T.C. 141; *Schuhmacher* v. *Commissioner*, 8 T.C. 453; *Levy* v. *Commissioner*, 42 B.T.A. 991.[21]

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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[21] *Blair* v. *Stewart*, 49 F. 2d 257 (C.A. 5), holding a decedent husband's funeral expenses deductible in full from his estate, is not contrary in principle. That holding was based on the court's belief that under Texas law funeral and administration expenses were chargeable in their entirety against a decedent husband's estate rather than against the community as a whole—an assumption which has since been expressly repudiated by the Texas courts. See *Norwood* v. *Farmers & Merchants Nat. Bank, supra.*

APPENDIX

Internal Revenue Code of 1939 (26 U.S.C. 1952 ed.)

SEC. 812. NET ESTATE.

For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

* * *

(b) [as amended by Sec. 405(a), Revenue Act of 1942, c. 619, 56 Stat. 798, and Sec. 502, Revenue Act of 1950, c. 994, 64 Stat. 906] *Expenses, Losses, Indebtedness and Taxes.*—Such amounts—

(1) for funeral expenses,

(2) for administration expenses,

(3) for claims against the estate, and

(4) for unpaid mortgages upon, or any indebtedness in respect to, property where the value of decedent's interest therein, undiminished by such mortgage or indebtedness, is included in the value of the gross estate,

as are allowed by the laws of the jurisdiction, whether within, or without the United States, under which the estate is being administered, but not including any income taxes upon income received after the death of the decedent, or property taxes not accrued before his death, or any estate, succession, legacy, or inheritance taxes. The deduction herein allowed in the case of claims against the estate, unpaid mortgages, or any indebtedness shall, when founded upon a promise or agreement, be limited to the extent that they were contracted bona fide and for an adequate and full consideration in money or money's worth; * * *

* * *

(e) [as added by Sec. 361(a), Revenue Act of 1948, c. 168, 62 Stat. 110] *Bequests, Etc., to Surviving Spouse.*—

(1) *Allowance of marital deduction.*—

(A) *In General.*—An amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

* * *

(E) *Valuation of Interest Passing to Surviving Spouse.*—In determining for the purposes of subparagraph (A) the value of any interest in property passing to the surviving spouse for which a deduction is allowed by this subsection—

* * *

(ii) where such interest or property is encumbered in any manner, or where the surviving spouse incurs any obligation imposed by the decedent with respect to the passing of such interest, such encumbrance or obligation shall be taken into account in the same manner as if the amount of a gift to such spouse of such interest were being determined.

* * * * *

SEC. 1000. IMPOSITION OF TAX

(a) For the calendar year 1940 and each calendar year thereafter a tax, computed as provided in section 1001, shall be imposed upon the transfer during such calendar year by any individual, resident or nonresident, of property by gift. * * *

(b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; * * *.

Treasury Regulations 105 (Estate Tax, 1939 Code)

SEC. 81.29. *Deduction of administration expenses, claims, etc.*—In order to be deductible under the foregoing provisions of the Internal Revenue Code, the item must fall within one of the several classes of deductions specifically enumerated therein, and must also, except in the case of deductible losses during the administration of the estate, be one the payment of which out of the estate is authorized by the laws of the jurisdiction under which the estate is being administered. Unless both of these conditions exist the item is not deductible. If the item is not one of those described it is not deductible merely because payment is allowed by the local law. If the amount which may be expended for the particular purpose is limited by the local law no deduction in excess of such limitation is permissible. If a claim against the estate, an unpaid mortgage, or an indebtedness is founded upon a promise or agreement, the deduction therefor is limited to the extent that the liability was contracted bona fide and for an adequate and full consideration in money or money's worth. * * *

* * *

SEC. 81.32. *Administration expenses.*—The amounts deductible from the gross estate as "administration expenses" are such expenses as are actually and necessarily incurred in the administration of the estate; that is, in the collection of assets, payment of debts, and distribution among the persons entitled. The expenses contemplated in the law are such only as attend the

settlement of an estate by the legal representative preliminary to the transfer of the property to individual beneficiaries or to a trustee, whether such trustee is the executor or some other person. Expenditures not essential to the proper settlement of the estate, but incurred for the individual benefit of the heirs, legatees, or devisees, may not be taken as deductions. Administration expenses include (1) executor's commissions; (2) attorney's fees; (3) miscellaneous expenses. * * *

* * * *

SEC. 81.36. *Claims against the estate.*—The amounts that may be deducted under this heading are such only as represent personal obligations of the decedent existing at the time of his death, whether or not then matured, and interest thereon which had accrued at the time of death. * * * Only claims enforceable against the decedent's estate may be deducted. If the claim is founded upon a promise or agreement, the deduction therefor is limited to the extent that the liability was contracted bona fide and for an adequate and full consideration in money or money's worth. * * *

* * * *

SEC. 81.47c. [as added by T. D. 5699, 1949-1 Cum. Bull. 181, 206]. *Valuation of property interest passing to surviving spouse.*— * * * (b) *Property interest subject to an incumbrance or obligation.* Section 812 (e)(1)(E) provides that where a property interest passed from the decedent to his surviving spouse subject to a mortgage or other incumbrance, or where an obligation is imposed upon the surviving spouse by the decedent in connection with the passing of a property interest, the value of such property interest is to be reduced by the amount of such mortgage, other incumbrance, or obligation. The passing of a property interest subject to the imposition of an obligation by the decedent does not include a bequest, devise, or transfer

in lieu of dower, curtesy, or of a statutory estate created in lieu of dower or curtesy or of other marital rights in the decedent's property or estate. The passing of a property interest subject to the imposition of an obligation by the decedent does, however, include a bequest, etc., in lieu of the interest of his surviving spouse under community property laws unless such interest was, immediately prior to the decedent's death, a mere expectancy. * * *

The following are illustrative of property interests which passed from the decedent to his surviving spouse subject to the imposition of an obligation by the decedent:

(1) A decedent devised a residence valued at $25,000 to his wife, with a direction that she pay $5,000 to his sister. For the purpose of the marital deduction, the value of the property interest passing to the wife is only $20,000.

* * * * *

(3) A decedent bequeathed certain securities to his wife in lieu of her interest in property held by them as community property under the law of the State of their residence. The wife elected to relinquish her community property interest and to take the bequest. For the purpose of the marital deduction, the value of the bequest is to be reduced by the value of the community property interest relinquished by the wife.

* * * * *

Treasury Regulations 108 (Gift Tax, 1939 Code)

SEC. 86.2 [as amended by T.D. 5902, 1952-1 Cum. Bull. 167]. *Transfers reached.*—(a) *In general.*—The statute imposes a tax whether the transfer is in trust or otherwise, whether the gift is direct or indirect,

and whether the property is real or personal, tangible or intangible. * * * Inasmuch as the tax also applies to gifts indirectly made, all transactions whereby property or property rights or interests are gratuitously passed or conferred upon another, regardless of the means or device employed, constitute gifts subject to tax. * * * In the following examples of transactions resulting in taxable gifts, it will be understood that the transfers were not made for an adequate and full consideration in money or money's worth:

* * * * *

(2) The transfer of property to B where there is imposed upon B the obligation of paying a commensurate annuity to C is a gift to C.

(3) The payment of money or the transfer of property to B in consideration whereof B is to render a service to C, is a gift to C, or both to B and C, depending on whether the service to be rendered by B to C is or is not an adequate and full consideration in money or money's worth for that which is received by B.

* * * * *

(5) If A with his own funds purchases property and has the title thereto conveyed to himself and B as joint owners, with rights of survivorship (other than a joint ownership described in example (4) of this section), but which rights may be defeated by either party severing his interest, there is a gift to B in the amount of one-half the value of such property.

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